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LAW OFFICES
FRANK L. PELLEGRINI
A PROFESSIONAL CORPORATION
SUITE 400
CHOUTEAU CENTER
133 SOUTH ELEVENTH STREET
ST. LOUIS, MISSOURI 63102

FRANK L. PELLEGRINI
JULIE A. EMMERICH

TELEPHONE (314) 241-7445
FAX (314) 241-7449
E 6

July 16, 1990

Mr. James L. Morgan
Assistant Attorney General
Environmental Control Division
Attorney General
State of Illinois
Springfield, Illinois 62706

Re: Sauget Sites Area II --
EPA Interim Municipal Settlement Policy

Dear Jim:

Enclosed please find a copy of the EPA Interim Municipal Settlement Policy. During our meeting on July 6, 1990, we discussed the policy of EPA in refraining from involving municipalities and municipal wastes in the Superfund settlement process. We indicated that we would provide you with a copy of the policy.

As you can see, the policy indicates that it is the position of EPA to refrain from naming municipalities as PRPs and from requiring the cleanup of municipal landfills if the source of the municipal waste is believed to come from households, unless unusual circumstances are present. The policy is one promulgated by U.S. EPA; however, IEPA would seem to be required to follow a course of action consistent with U.S. EPA policy.

It is our understanding that your office and IEPA are currently considering the "Addendum to the Work Plan for the Rivers Edge Landfill (Site R) for Remedial Investigation/Feasibility Study" submitted by Geraghty & Miller, Inc. We are awaiting your response to that proposal and hope that you will

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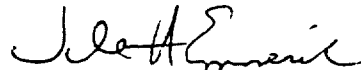
IEPA/DLPC

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Mr. James L. Morgan
Assistant Attorney General
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consider this policy in making that determination. If you have any questions, please do not hesitate to call.

Sincerely yours,



Julie A. Emmerich

JAE/db

Enclosure

cc: Paul Takacs
Project Manager
Division of Land Pollution Control
Illinois EPA
2200 Churchill Road
Springfield, Illinois 62706

Richard D. Burke
Executive Vice President
Eagle Marine Industries, Inc.
200 North Broadway, Suite 1725
St. Louis, Missouri 63102

Milton Greenfield, Jr.
Attorney and Counselor at Law
7751 Carondelet, Suite 500
St. Louis, Missouri 63105

EPA INTERIM MUNICIPAL SETTLEMENT POLICY

(Published at 54 FR 51071, December 12, 1989)

I. Effective Date of Interim Policy and Role of Public Comment

This interim policy is effective immediately. However, the Agency emphasizes that this is an interim policy and that there is an important role for public comment. We are providing the public within 60 days to review and submit comments in writing. Based upon public comment or on our experience in implementing the interim policy, the Agency may address additional issues or revise the interim policy accordingly.

II. Purpose of Interim Policy

The primary purpose of this interim policy is to provide interim guidance to EPA Regional offices on how they should exercise their enforcement discretion in dealing with municipalities and municipal wastes in the Superfund settlement process. An additional purpose is to provide municipalities and private parties who may be potentially liable under section 107(a) of CERCLA with information about how EPA will handle them in the settlement process. We believe this interim policy is important for establishing a national framework that will help facilitate our ability to reach settlements and will ensure that sites involving municipalities or municipal wastes are addressed consistently throughout the country.

III. Focus of Interim Policy

The interim policy focuses on how EPA will proceed in attempting to reach settlements at sites involving municipalities or municipal wastes. Focusing on settlements means the interim policy indicates how EPA will attempt to reach voluntary agreements for responsible party financing and/or cleanup of sites involving municipalities or municipal wastes. Nothing in

the interim policy affects any party's potential legal liability under CERCLA. Any decision EPA makes in exercising its enforcement discretion under this interim policy does not mean that potential CERCLA legal liability no longer applies. In particular, nothing in the interim policy precludes a third party from initiating a contribution action.

Focusing on settlements involving municipalities or municipal wastes means that the primary intent of the interim policy is to address questions about how EPA should handle municipalities or municipal wastes in the Superfund settlement process. However, in the process of addressing those questions we found it necessary to address other issues relating to private parties and certain kinds of commercial, institutional, or industrial wastes. We have addressed these related issues because private parties sometimes handle municipal wastes, private parties generate some wastes streams that are similar in nature to municipal wastes, and municipal and industrial wastes are sometimes co-disposed at the same site (particularly municipal landfills).

Specific questions that have been examined by EPA as part of this interim policy relate to who should be included in the information gathering process, who should be notified as potentially responsible parties, how municipalities should be handled in the settlement process, and how the treatment of municipalities and municipal wastes affects the Agency's treatment of private parties and certain kinds of commercial, institutional, or industrial wastes.

IV. Why Settlement Involving Municipalities or Municipal Wastes Is An Issue

Involving municipalities and municipal wastes in the Superfund settlement pro-

cess is an issue because questions have been raised about how such parties and wastes should be treated in the settlement process. Until the development of this interim policy, EPA had not addressed these questions from a national perspective. This issue is important because there are a significant number of proposed and final sites on the National Priorities List (NPL) that involve municipalities or municipal wastes, and EPA expects more of these sites to be added to the NPL in the future.

EPA has identified 320 (about 25%) of the 1219 proposed and final NPL sites that may involve municipalities or municipal wastes. Of those sites, 236 (about 20%) have been classified as municipal landfills. EPA defines a municipal landfill as any landfill, either publicly or privately owned, which has received municipal, solid waste. Although it is difficult to accurately predict how many of those sites involving municipalities or municipal wastes may be added to the NPL, historically about 20% of each NPL update has included municipal landfills. Municipal landfills are particularly complex sites to address because they typically involve multiple responsible parties (sometimes hundreds of different parties), multiple sources of wastes (often municipal and industrial wastes), as well as diverse waste streams (in terms of amount and toxicity).

V. Discussion of Interim Policy

In the development of this interim policy, EPA has examined a variety of issues and options for addressing these issues. We have also made an effort to provide meaningful opportunities for interested parties to participate in the debate about municipal settlements. EPA has listened to all sides of the debate and has attempt-

process or activity, the generator/transporter generally will not be notified as a potentially responsible party by EPA and brought into the Superfund settlement process.

In carrying out this approach, EPA is exercising its enforcement discretion in determining whether we will treat generator/transporters as potentially responsible parties for certain categories of wastes. EPA believes this approach is fair and manageable. For example, this approach treats municipalities and private parties that handle the same waste streams in the same manner (e.g., municipal generators/transporters of municipal solid waste are treated the same as private party generators/transporters of such waste.)

This approach also treats different waste streams in a logical and consistent manner. A key factor in determining whether to notify generators/transporters of municipal solid waste, sewage sludge, trash from a commercial, institutional, or industrial entity, or low-hazardous industrial wastes is tied to whether a hazardous substance is present that is derived from a commercial, institutional, or industrial process or activity.

Finally, this approach is one that can be effectively managed and implemented by EPA's Regional offices. For example, based on our experiences at Superfund sites, especially municipal landfills, we believe that it is generally not a cost-effective use of our enforcement resources to pursue those generators/transporters whose only contribution at a Superfund site appears to have been substances that may have been contaminated only with relatively small quantities of household hazardous waste (e.g., municipal solid waste). The resource-intensive nature of obtaining sufficient evidence to demonstrate the presence of household hazardous waste as well as the potentially increased transaction cost of settlement and/or litigation far outweigh the possible benefit the Government may derive from obtaining cleanup costs from such parties. The Agency believes that its enforcement resources are better spent on pursuing other potentially responsible parties to achieve the cleanups needed to effectively implement the Superfund program and to protect human health and the environment.

3. *Role of municipalities in the settlement process.* There are also different

views on the appropriate treatment of municipalities vis-a-vis private parties in the settlement process (i.e., whether municipalities should receive "special treatment" because they are governmental entities). Municipalities generally believe they should be treated differently than private potentially responsible parties while industry generally believes they should not.

EPA believes that municipalities and private parties should generally be handled in the same manner in the settlement process. Handling municipalities and private parties the same means that EPA will seek information in appropriate circumstances from all parties, including municipalities. This also means that all parties who are owners/operators of facilities will generally be notified as potentially responsible parties.

Relating to municipal solid waste or sewage sludge, all parties who are generators/transporters (either municipalities or private parties) are generally exempt from notification unless we obtain site-specific information that the waste contains a hazardous substance from a commercial, institutional, or industrial activity or process. In instances relating to notification as a potentially responsible party, we focus on the nature/source of the waste, not whether the party is a municipality or private party.

The interim policy also handles municipalities and private parties essentially in the same manner once they are notified as potentially responsible parties by attempting to negotiate and settle with such parties as one group, unless separate settlements such as *de minimis* settlements pursuant to section 122(g) of CERCLA are appropriate. Nevertheless, EPA does recognize that municipalities have unique characteristics as governmental entities which EPA may take into account when designing specific settlements (e.g., by considering delayed payments, delayed payment schedules, or in-kind contributions under appropriate circumstances).

Dated: December 6, 1980.

Don R. Clay,

Assistant Administrator, Office of Solid Waste and Emergency Response.

Memorandum

Subject: Interim Policy of CERCLA Settlements Involving Municipalities or Municipal Wastes

From: Don R. Clay, Assistant Administrator
To: Regional Administrators, Regions I—X

I. Introduction

(A) *Focus of Interim Policy*

This memorandum establishes EPA's interim policy on settlements involving municipalities or municipal wastes under section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). In particular, this interim policy indicates how EPA will exercise its enforcement discretion when pursuing settlements which involve municipalities or municipal wastes.¹ The municipal wastes addressed by this interim policy are municipal solid waste (MSW) and sewage sludge as defined below. This interim policy has been developed to provide a consistent Agency-wide approach for addressing municipalities and municipal wastes in the Superfund settlement process.

Although this interim policy focuses on municipalities and municipal wastes, it addresses how private parties and certain kinds of commercial, institutional, or industrial wastes will be handled in the settlement process as well. It is important to address private parties and certain kinds of commercial, institutional, or industrial wastes in this interim policy because private parties sometimes handle municipal wastes or wastes of a similar nature and because municipal and private party waste streams are sometimes co-disposed at sites, particularly municipal landfills. The kinds of commercial, institutional, or industrial wastes covered by this interim policy include "trash from a commercial, institutional, or industrial entity" and "low-hazardous industrial wastes" as defined below.

There are three fundamental issues addressed by this interim policy. First is whether to notify generators/transporters of MSW or sewage sludge that they are considered to be potentially responsible parties (PRPs) and to include them in the

¹ This interim policy does not provide an exemption from potential CERCLA liability for any party; potential liability continues to apply in all situations covered under section 107 of CERCLA.

possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, [commonly referred to as "generators"]¹.

4. Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person (commonly referred to as "transporters").

Section 107(a) describes liable parties as "persons" and the definition of "person" under Section 101(21) includes municipalities and political subdivisions of a State. Municipalities may, therefore, be PRPs as part of CERCLA's broad definition of who is potentially liable.

(B) Municipal Wastes as Potential CERCLA Hazardous Substances

Similarly, the statute does not provide an exemption from liability for municipal wastes. Municipal wastes may be considered hazardous substances if they are covered under the definition of hazardous substances in section 101(14) of CERCLA. As indicated under the definitions of MSW and sewage sludge, these municipal wastes are generally characterized by large volumes of non-hazardous substances and may contain small quantities of household hazardous or other wastes, although the actual composition of the waste streams vary considerably at individual sites. To the extent municipal wastes contain a hazardous substance that is covered under section 101(14) of CERCLA and there is a release or threatened release, such municipal wastes may fall within the CERCLA liability framework.

III. Information Gathering

The Regions should include all municipal and private party owners/operators and generators/transporters in the information gathering process, including the generators/transporters of municipal wastes. This means

¹ Persons who fall into this category are commonly referred to as "generators," although liability under this section extends beyond "true generators" of hazardous substances to include persons who arranged for the disposal or treatment of hazardous substances owned or possessed by such party or another party. The term "generator" is used throughout this document to refer to any party who is potentially liable under section 107(a)(93).

that municipal owners/operators as well as municipal generators/transporters should generally receive section 104(e) information request letters and should otherwise be fully included in the information gathering process like private parties. Information obtained through such letters or through other means is important for determining (among other things) whether it is appropriate to notify a party as a PRP, including whether to notify a generator/transporter of MSW or sewage sludge as discussed below.²

IV. Notification of Potential Responsibility

(A) Owners/Operators

The same approach will be used for both municipalities and private parties when determining whether to notify them as owners/operators. Specifically, such parties will generally be notified where they were past owners or operators of facilities at the time of disposal of hazardous substances, or they are present owners or operators of facilities where hazardous substances have been released or there is a threatened release.

(B) Generators/Transporters³

1. *Municipal solid waste.* Municipalities and private parties will be treated the same when determining whether to notify them as PRPs when they are generators/transporters of MSW. Specifically, such parties will not generally be notified unless:

* The Region obtains site-specific information that the MSW contains a hazardous substance;⁴ and

* The Regions may accept and consider credible site specific information from any party to supplement their own information gathering efforts as appropriate.

² The categories of wastes discussed below, i.e., relating to municipal solid waste, sewage sludge, trash from a commercial, institutional, or industrial entity, and low-hazardous industrial wastes, are defined in the "Introduction" to this interim policy (See I.B.).

³ The term "site-specific" information refers to information pertaining to a particular Superfund site. "Site-Specific" information does not generally include, for example, "general studies" conducted by EPA or other parties which draw general conclusions about whether MSW or sewage sludge typically contain a certain percentage of hazardous substances unless the "general study" includes "site-specific" information obtained from the PRP or superfund site in question. "General studies" may nonetheless be used to supplement "site-specific" information.

* The Region has reason to believe that the hazardous substance is derived from a commercial, institutional, or industrial process or activity.

This means that EPA will not generally notify municipalities or private parties who are generators/transporters of MSW if only household hazardous wastes (HHW) are present, unless the truly exceptional situation discussed below exists. The general policy of not notifying parties who are generators/transporters of HHW extends to "HHW collection day programs" as well.⁵

This also means that such parties may be notified as PRPs if the MSW contains hazardous substances from non-household sources. Non-household sources include, but are not limited to, small quantity generator (SQG) wastes from commercial or industrial processes or activities, or used oil or spent solvents from private or municipally-owned maintenance shops.

Notwithstanding the above general policy, there may be truly exceptional situations where EPA may consider notifying generators/transporters of MSW which contains a hazardous substance derived only from households. Such notification may be appropriate where the total contribution of commercial, institutional, and industrial hazardous waste by private parties to the site is insignificant when compared to the MWS.⁶ In this situation, the Regions should seriously consider notify-

⁵ The term "HHW collection day programs" refers to programs that have generally been sponsored by municipalities or community organizations whereby residents voluntarily remove their HHW from their household waste. The HHW is then typically disposed of in a RCRA Subtitle C hazardous waste facility and the household waste is typically disposed of in a RCRA subtitle D solid waste facility.

⁶ The Regions should consider both the volume and the toxicity of the commercial, institutional, and industrial hazardous waste when determining whether it is insignificant when compared to the MSW. In determining whether the volume is insignificant, the Regions should consider the total volume of such waste contributed by all private parties. In determining whether the toxicity is insignificant, the Regions should consider whether such waste is significantly more toxic than the MSW and whether such waste requires a disproportionately high treatment and disposal cost or requires a different or more costly remedial technique than that which otherwise would be technically adequate for the site.

3. *In-kind contributions.* The settlement could be structured to allow for an in-kind contribution, especially where a municipality can provide only a portion of its share of costs or is unable to provide a monetary payment. In-kind contributions may be made in conjunction with or in lieu of cash. Factors the Regions may use in considering the appropriateness of an in-kind contribution may include the overall financial health of the municipality, the amount of the municipality's share, the value of the in-kind contribution, and the effect of the in-kind contribution on the overall effort to achieve settlement.

One mechanism for allowing an in-kind contribution could be a "carve-out" order when, for example, the municipal PRP has

agreed to provide the operation and maintenance at the facility. Other in-kind contributions could include the use of trucks and equipment to carry out cleanup activities, the installation of fences and the provision of other security measures to control public access to the site, or the use of the municipality's sewage treatment plant.

(C) Contribution Protection

Nothing in this interim policy affects the rights of any party in seeking contribution from another party, unless such party has entered into a settlement with the United States or a State and obtained contribution protection pursuant to section 113(f) of CERCLA.¹¹

¹¹ Under section 113(f), where EPA determines that settlement is in the best interest of the Federal government, CERCLA provides contribution protection to the settling parties for matters covered by the settlement. This may include a party who has not been notified as a

VI. Disclaimer

This interim policy is intended solely for the guidance of EPA personnel. It is not intended and can not be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

VII. For Further Information

For further information or questions about this interim policy, the Regions may contact Kathleen MacKinnon in the Office of Waste Programs Enforcement at FTS-475-9812. Inquiries by other persons should be directed to Ms. MacKinnon at 202-475-6771.

lish criteria for evaluating whether a particular site is good candidate for a structured settlement. EPA expects to issue this interim guidance in the Spring of 1990.

PRP by EPA but wishes to settle its potential CERCLA liability.